Supreme Court, U.S.
FILED
JUN 19 1996
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No. 95-1878

In The

Supreme Court of the United States

October Term, 1995

DALE NELSON,

Petitioner,

vs.

J.C. PENNEY COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent J.C. Penney Company, Inc. has no parent companies or nonwholly owned subsidiaries to list pursuant to Rule 29.6.

REASONS FOR DENYING THE WRIT

Petitioner Dale Nelson alleged in his lawsuit that Respondent J.C. Penney Company, Inc. terminated him because of his age. The company articulated legitimate reasons for the termination — Nelson's abrasive and intimidating management style had produced uprisings in the stores he managed. (Pet. App. B, 6a-7a, 10a). Upon review of the record, the Court of Appeals determined that "[t]here was no conflicting testimony or other substantial evidence . . . from which a reasonable factfinder could conclude that the employer's proffered reasons for Mr. Nelson's termination were pretextual" and ordered judgment as a matter of law in J.C. Penney's favor. *Nelson v. J.C. Penney* (Pet. App. B, 10a-11a).

The Petition for a Writ of Certiorari should be denied. It is untimely and presents neither important issues for this Court nor a conflict among Courts of Appeals.

I. THE PETITION FOR CERTIORARI IS UNTIMELY.

This Court lacks jurisdiction because the Petition was not filed within 90 days of the judgment below as required by 28 U.S.C. § 2101(c). "This 90-day limit is mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

The Court of Appeals issued its initial decision in this case on November 21, 1995. *See Nelson v. J.C. Penney*, 70 F.3d 962 (1995). On December 1, 1995, Nelson filed a "Suggestion for Rehearing *En Banc*," which the Court of Appeals treated as also including a *petition* for rehearing by the panel, thereby tolling the period for seeking certiorari until the panel ruled on the petition for rehearing. The panel denied rehearing on January 24, 1996, thus beginning Nelson's 90-day period in which to petition for

certiorari.[1] After that date, all Nelson had pending in the Eighth Circuit was a *suggestion* for rehearing *en banc* (no longer treatable as a *petition* for rehearing since the panel had already denied that) which does not toll the period for seeking certiorari. Supreme Court Rule 13.3; Fed. R. App. P. 35; *Missouri v. Jenkins*, 495 U.S. at 45 - 47. Therefore, Nelson's Petition — filed on May 17, 1996 (114 days after the denial of rehearing by the panel) — is untimely and this Court has no jurisdiction over it. 28 U.S.C. § 2101(c); *Missouri v. Jenkins*, 495 U.S. at 45.

II. THIS PETITION INVOLVES NOTHING MORE THAN PETITIONER'S DISAGREEMENT WITH THE APPELLATE COURT'S REVIEW OF THE RECORD.

Nelson contends that the Eighth Circuit failed to follow this Court's decision in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). (Pet. at 4-18). To give that impression, he takes quotations from the decision here out of context (wrongly implying that the Court of Appeals held that no age discrimination plaintiff can prevail without "direct" evidence of discrimination) and juxtaposes them with quotations from *Hicks*, also taken out of context (wrongly implying that there can be no appellate review of a jury's finding of discrimination whenever a prima facie case is established).[2] (Pet. at 7).

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1. Nelson's Petition sidesteps this jurisdictional defect by omitting any mention of the Court of Appeals' November 21, 1995 decision; by omitting any mention that the January 24, 1996 decision was, in fact, a denial of what the court deemed a pettion for rehearing by the panel; and by omitting from Appendix B to the Petition the first page of the January decision, which reads, in part: "Appellee/ Cross-Appellant's petition for rehearing by the panel has been considered by the court and is denied." (App. hereto). Instead, the Petition implies that the panel's January denial of rehearing was its first adjudication of the case, and gingerly states that "[t]he latest opinion of the . . . Court of Appeals . . . was a decision to deny a *Petition* for Rehearing en banc." (Pet. at 1 [emphasis added])

2. Nelson's concern that the Eighth Circuit's decision does not cite (Cont'd)

Here, the Eighth Circuit examined all of Nelson's evidence of pretext and found it insufficient. (Pet. App. B, 8a-10a). After concluding that there was no submissible case based on proof of pretext, the court also considered whether there was a submissible case based on direct evidence of age as a motivating factor; only there did it state "we see no evidence 'directly reflecting the alleged discriminatory attitude' " — a view which is undisputed in this case. (Pet. App. B, 8a - 10a) Such appellate review is both necessary and proper. *See Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) (reversing jury's finding of age discrimination where the evidence was legally insufficient). The Eighth Circuit's analysis was, accordingly, completely consonant with its obligations under both *Hazen Paper* and *Hicks*. 113 S. Ct. at 2756 (factfinder determines pretext "subject, of course, to appellate review. . . .").

III. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS.

The difference between this case and those Nelson cites is not in the law applied, but in the record.[3] Although Nelson cites

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(Cont'd)

Hicks by name (Pet. at 3) is inconsequential. The court recites the burden-shifting analysis used in *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994), which is taken directly from *Hicks* and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-255 (1981). (Pet. App. B, 7a-8a). Contrary to Nelson's assertion, moreover, the Eighth Circuit's reference to *Boatmen's* is proper even though *Boatmen's* involved a reduction in force: the burden-shifting/proof of discrimination analysis in *Boatmen's* is the same as in *Hicks* and *Burdine*. 26 F.3d at 801.

3. Nelson, however, continues to misrepresent that record. For example, his assertion that the Court of Appeals ignored evidence — *e.g.*, that "Penney's expert witness testified that managers are expected to retire at age 60" (Pet. at 8 - 9, *citing* J.A. at 834-836) — is disingenuous. The testimony was not from an expert and was not what Nelson claims, but only innocuous background evidence that age 60 is the point when some managerial employees are permitted to take full retirement benefits. (J.A. at 836).

Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996), that decision acknowledged that appellate review is fact-intensive: "[t]he evidence necessary to support an inference of discrimination will vary from case to case. . . . [and] if the evidence put forth by the plaintiff to establish the *prima facie* case and to rebut the employer's reasons is not substantial, a jury cannot reasonably infer discriminatory intent." 75 F.3d at 994. The Fifth Circuit there upheld the jury verdict because the employer changed its proffered reason (first citing a reduction in force, later claiming performance problems) and its own officials testified that the reduction in force reason was untrue and also contradicted the claim of poor performance. *Id.* at 994-996. These facts starkly contrast to the lack of "conflicting testimony or other substantial evidence . . . from which a reasonable factfinder could conclude that the employer's proffered reasons for Mr. Nelson's termination were pretextual." *Nelson v. J.C. Penney* (Pet. App. B, 10a). The different results on appeal merely reflect conflicting facts — not conflicting legal standards.[4]

Nelson also suggests that the Eighth Circuit deviated from its own precedent. That is both insignificant and wrong. A conflict between decisions of different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974). More importantly, there is no conflict here. The instant case differs from *Gaworski v. Commercial Finance Corp.*, 17 F.3d 1104,

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4. That is equally true of the supposed conflict Nelson suggests exists with *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995), *cert. granted in part*, 116 S. Ct. 805, *cert. dismissed*, 116 S. Ct. 1037 (1996) (plaintiff "introduced sufficient evidence for the jury to conclude . . . that he had proven . . . [the employer's] proffered reasons were pretextual"). Certiorari, moreover, was granted in *Barbour* solely on the issue of what must be proven to establish punitive damages under 42 U.S.C. § 1981, and has since been dismissed due to settlement. *See* 116 S. Ct. 805 and 116 S. Ct. 1037.

1110 (8th Cir. 1994) — which Nelson also cites — not in the standard applied but in the record: in *Gaworski*, the court found "sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions." *See Ryther v. KARE 11*, 84 F.3d 1074, n.3 (8th Cir. 1996) (upholding a jury verdict, but explicitly recognizing that *Nelson v. J.C. Penney* is consistent with the standards applied).

Application of the same standards to different facts does not create a conflict between Courts of Appeals or even within the Eighth Circuit. The instant Petition merely asks the Court to review a factual record. It presents no significant legal issues and is not worthy of this Court's attention.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED JANUARY 24, 1996

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-1253/1305

Dale Nelson,

Appellee/Cross-Appellant,

vs.

J.C. Penney Company, Inc.,

Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Iowa

Appellee/Cross-Appellant's petition for rehearing by the panel has been considered by the court and is denied.

Attached to this order is a revised opinion. This opinion supersedes the opinion filed on November 21, 1995.

January 24, 1996

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit